

*United States Court of Appeals  
for the Second Circuit*



**SUPPLEMENTAL  
APPENDIX**



75-7121

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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MIRIAM WINTERS,

Plaintiff-Appellant,

b

-against-

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of Psychiatric Division, Bellevue Hospital Center, FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; Doctors H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD GRANT, GERALD OLLINS, CHRISTINE JORDÁN, THOMAS DACORTA and CATHERINE DROMGOOLE, and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

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JOINT SUPPLEMENTAL APPENDIX

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Bruce Ennis,  
New York Civil Liberties Union  
84 Fifth Avenue  
New York, New York 10011

Jonathan A. Weiss  
Phillip Gassel  
Legal Services for the Elderly  
Poor  
2095 Broadway  
New York, New York 10023

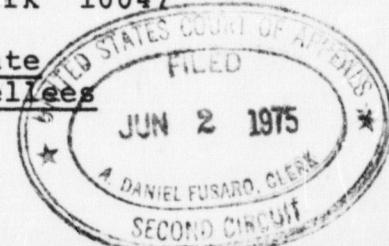
Attorneys for Plaintiff-Appellant

W. Bernard Richland  
Corporation Counsel  
Municipal Building  
New York, New York 10007

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Two World Trade Center  
New York, New York 10047

Attorney for Defendants-Appellees Thomas & Ollins

Attorney for State Defendants-Appellees



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Transcript of Record of Proceedings  
of November 4, 1974

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1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 - - - - - x

4 MIRIAM WINTERS, on behalf of herself and :  
5 all others similarly situated,

6 Plaintiff,

7 -against- 69 Civ. 783

8 ALAN D. MILLER, M.D., individually and as  
9 Commissioner of Mental Hygiene of the :  
State of New York; ALEXANDER THOMAS, M.D., :  
10 individually and as Director of the :  
Psychiatric Division, Bellevue Hospital :  
Center; FRANCIS J. O'NEILL, M.D., indivi- :  
dually and as Director of Central Islip :  
11 State Hospital; DRS. H. BLANKFELD, DUSAN :  
KOSOVIC, SANDRA GRANT, GERALD OLLINS, :  
12 CHRISTINE JORDAN, THOMAS DaCORTA and :  
CATHERINE DROMGOOLE, and other doctors on :  
the staff of Bellevue Hospital and Central :  
13 Islip Hospital whose names are unknown to :  
14 Plaintiff,

15 Defendants. :

16 - - - - - x

17 United States Court House  
18 Brooklyn, New York

19 November 4, 1974  
10:00 o'clock a.m.

20 Before:

21 HONORABLE ORRIN G. JOOD, U. S. D. J.

22

23 DANIEL D. SIMON  
24 OFFICIAL COURT REPORTER

25

## 2      Appearances:

3            GEORGE H. WEILER, ESQ.,  
4            Deputy Assistant Corporation Counsel,  
5            representing Dr. Alexander Thomas and another,  
6            Municipal Building,  
7            Brooklyn, New York.

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1 THE CLERK: Winters against Miller.

2 THE COURT: Anyone here for the plaintiff?

3 MR. WEILER: Mr. Weiss -- I can give your  
4 Honor some information. It is this, that Mr. Weiss  
5 called me Friday. I called him back and he told me  
6 in view of the fact that depositions were not yet  
7 returned, either side that was, either the plaintiff  
8 or the State Attorney General, that he had asked to  
9 put the case over. It was not necessary for me to  
10 appear. But I saw in today's Law Journal it was  
11 still on the calendar, so I came over.

12 I was surprised to hear that evidently there  
13 had been some failure in communication by the attorney  
14 for the plaintiff, and your chambers had not been  
15 notified.

16 To give your Honor a capsule of the case as it  
17 now exists, on September 20th, after four adjournments,  
18 Mrs. Winters was deposed at her hotel room in the  
19 Hotel St. George. The State Attorney General had  
20 the reporter.

21 At that time, September 20th, everybody ap-  
22 peared and Mrs. Winters was deposed. And her attor-  
23 ney, Mr. Ennis and Mr. Weiss, were both there.

24 That, I understand, has not yet been transcribed  
25 by the Attorney General's hired outside reporter.

1                   On October 10th, the Director of Central Islip  
2                   State Hospital was deposed at the instance of the  
3                   plaintiff. I wasn't at that.

4                   On the 13th and 14th, Dr. Thomas and Dr.  
5                   Miller, in order, Dr. Thomas being the Director of  
6                   Psychiatric Services at Bellevue, he was deposed, and  
7                   I was present, of course.

8                   On the next day, Commissioner Miller, the  
9                   Commissioner of Mental Hygiene of the State of New  
10                  York, was deposed at the instance of the plaintiff at  
11                  the World Trade Center, which is the office of the  
12                  Attorney General. And I was present at that.

13                  I understand that none of those transcripts  
14                  which were taken at the instance of the plaintiff  
15                  have yet been transcribed.

16                  Mrs. Winters -- Mr. Weiss tells me that that  
17                  is necessary, that he had the transcript of the  
18                  various doctors.

19                  Now, I have only one problem in the event that  
20                  your Honor grants adjournment --

21                  THE COURT: I am not going to adjourn it.  
22                  I am going to dismiss it. Apparently there was some  
23                  effort to communicate here but nobody told me the case  
24                  wasn't ready, and I have a jury ready to try it.

25

1           There being no appearance for the plaintiff, and it  
2           being a five-year-old case, the case will be dis-  
3           missed --

4           MR. WEILER: I do not want to appear for  
5           Mr. Weiss and Mr. Ennis, who have well stocked  
6           offices --

7           THE COURT: They have a year to make a motion  
8           to reinstate.

9           MR. WEILER: Fine.

10          THE COURT: All right.

11          MR. WEILER: Thank you. Since there is such  
12          an opportunity offered to them, I know they would  
13          want me to have asked for that.

14          I am sorry this has happened. I will com-  
15          municate with them.

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1  
2 UNITED STATES DISTRICT COURT

3 EASTERN DISTRICT OF NEW YORK

4 -----x

5 MIRIAM WINTERS, on behalf of herself and :  
all others similarly situated, :  
6 Plaintiff, :  
7 -against- : Civ. 69-783  
8 ALAN D. MILLER, M.D., individually and as :  
Commissioner of Mental Hygiene of the :  
State of New York; ALEXANDER THOMAS, M.D., :  
individually and as Director of the :  
Psychiatric Division, Bellevue Hospital :  
Center; FRANCIS J. O'NEILL, M.D., :  
individually and as Director of Central :  
Islip State Hospital; DRS. H. BLANKFELD, :  
DUSAN KOSOVIC, SANDRA GRANT, GERALD :  
OLLINS, CHRISTINE JORDAN, THOMAS CACORTA :  
and the staff of Vellevue Hospital and :  
Central Islip Hospital whose names are :  
unknown to Plaintiff, :  
15 Defendants. :  
16 -----x

17  
18  
19 United States Courthouse  
20 Brooklyn, New York  
November 4, 1974  
2:00 o'clock P.M.

21  
22 Before :

23 HONORABLE ORRIN G. JUDD, U.S.D.J.  
24

25 HENRY LEGENDRE  
COURT REPORTER

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Appearances:

GEORGE H. WEILER, ESQ.  
Deputy Assistant Corporation Counsel  
Attorney for Dr. Alexander Thomas and another  
Municipal Building  
Brooklyn, New York

JONATHAN WEISS, ESQ.  
LEGAL SERVICES FOR THE ELDERLY POOR

BRUCE ENNIS, ESQ.  
NEW YORK CIVIL LIBERTIES UNION  
-and-  
KANTOR & KANTOR, ESQS.  
BY: STANLEY KANTOR, ESQ.  
Of Counsel

THE COURT: I think you were here this morning,  
you heard Mr. Weiler's explanation that depositions were  
not completed. I said I would dismiss it subject to  
your right under Rule 60 to re-open it. If you are  
ready to try it now I'll hear you on an oral motion  
to re-open it.

MR. WEISS: I am ready to move to re-open it.

THE COURT: Tell me what is involved.

As I understand, at least the first \$25,000 that you  
recover from any city defendant would go back to the  
City as welfare payments, and if you get money from  
the state employees, wouldn't that also go to the City?

MR. WEISS: Your Honor, my own legal position  
is that such an attempt to recover that money could be  
resisted, and there are way --

THE COURT: Do you have any cases on that?

MR. WEISS: I have a series of Law Review  
articles -- there is a case that seems to say that  
you could recover it. There are a number of trust  
instruments that have been established which allow  
payment into a trust fund which would be safe from a  
lien by the City. I myself have established such  
trust funds in other cases of welfare recipients, so  
I believe that it would be actually of benefit to her.

Among ideas, your Honor, that I have thought of,  
your Honor, are the following:

Under the supplement security income you are entitled to have for property, like a house and still be on that program. One possible way of making the award would be in fact to use the funds to purchase condominiums or a house valued less than \$25,000 and therefore she would have a place rent free and still live on supplemental income. I have a number of ideas, discussed it with my client. I feel as an attorney I could do a job that she could achieve the results that she wanted. This is not an academic matter.

THE COURT: I am prepared to pick a jury and go to trial this afternoon.

MR. WEISS: I am not. My client is not. I believe the opposing side is not. I believe the denial of due process, if you were to force people to go ahead without the depositions based on cross-examination of the record.

Moreover, I believe you would be violating the Sixth Amendment of the Constitution , which I am willing to state that I'm not prepared to try the case at this moment and my client has under the Sixth

1       5           Amendment a constitutional right to effective counsel.  
2                   If I were to proceed now I would be ineffective  
3                   counsel and you also would deny her of her  
4                   constitutional rights.

5                   THE COURT: You could apply on papers showing  
6                   merit including your right to keep the recovery free  
7                   of the welfare lien.

8                   MR. WEISS: The merits have been stated by the  
9                   Second Circuit.

10                  THE COURT: They do not go into the effect of  
11                  the City's lien.

12                  MR. WEISS: The effect of the City's lien you  
13                  would deal with when and if we recover.

14                  MR. WEISS: Are you directing me to file  
15                  further papers?

16                  THE COURT: I've signed an order dismissing  
17                  the case.

18                  MR. WEISS: I can't speak for my co-counsel.  
19                  Maybe they will stipulate to re-open it.

20                  THE COURT: I am not going to take a  
21                  stipulation to re-open a five-year-old case where  
22                  counsel knew five months ahead that it was on the  
23                  calendar and failed to be here this morning.

24                  MR. WEISS: Your Honor, as far as my failing  
25                  to be here this morning, I believe it was not my

2 fault.

3 THE COURT: You tried to pin it on a new law  
4 clerk. I was in the Court of Appeals on Friday  
5 afternoon on a command performance for the twenty-fifth  
6 anniversary of Irving Kaufman and you picked that  
7 time to adjourn a case which --

8 MR. WEISS: I believe your recollection is not  
9 correct. I spoke to your law clerk two weeks previous.  
10 I spoke to him again on Tuesday and I told him I  
11 thought--

12 THE COURT: I wouldn't have spent Saturday  
13 morning getting ready for this case if I hadn't  
14 assumed it was going to trial.

15 MR. WEISS: I spoke two weeks previous,  
16 Tuesday previous, and I believe Thursday and Friday.

17 THE COURT: Don't you take a law journal in  
18 your office?

19 MR. WEISS: I receive a law journal in the  
20 morning and I received this morning after I received  
21 the phone call. I did not receive it on Friday. I  
22 talked to your law clerk. I am not trying to pin  
23 anything on him. He's been cooperative and helpful.  
24 I have never in my life missed a court appointment,  
25 approximately eleven years. I entered this case,

1           7 your Honor, two years ago, in order to help Civil  
2           Liberties Union to bring it to a quick close. I  
3           never asked for an adjournment in this case. I was  
4           ready to go to trial, if your Honor remembers, in  
5           May or June, and your Honor ruled that there had to  
6           be a deposition because there may be a phantom client.

7           THE COURT: I gave you three months.

8           MR. WEISS: With a great deal of cooperation  
9           to have that deposition, which your Honor thought was  
10          essential. My position was no deposition was  
11          essential at all. We could have gone to trial May or  
12          June. I wanted to try it five months ago and now I  
13          have depositions. Your Honor seems to be penalizing  
14          me. It doesn't seem to be fair.

15          THE COURT: You may make a motion on written  
16          papers in ten days, give me a memorandum as to the  
17          necessity of trying the case. In the light of the  
18          City's lien --

19          MR. WEISS: I will also give you the following  
20          -- I give you my word as a member of the Bar, that  
21          my purpose is to achieve concrete active results for  
22          my client, and I think I can do that. I think that  
23          ought to carry as much weight as the memorandum of  
24          law that I'd be glad to give you.

25          THE COURT: I'm sure that you would be

1                   8 interested in submitting some kind of statement on  
2                   the law on this subject but I am not going to try a  
3                   case just for that, if there is no practical result  
4                   from it.

5                   MR. WEILER: I could help everyone in this  
6                   regard. We have held depositions. I don't require  
7                   them. I would like to bring to the Court's  
8                   attention and to Mr. Weiss' attention on the record,  
9                   that he and I have been discussing this. I represent  
10                  on behalf of the Corporation Counsel, without cost,  
11                  two doctors, one is Dr. Thomas, the other is Dr. Owens,  
12                  and I will state and this has been shown and Mr. Weiss  
13                  can, I believe, confirm this: Dr. Thomas has no  
14                  connection with this case, because five months after  
15                  she left the hospital he was first appointed as the  
16                  director of psychiatric services, and in fact he was  
17                  not even -- had anything to do with the entire  
18                  subject matter of her stay. He was doing something  
19                  else at the hospital, wholly separated from her care.  
20                  Dr. Owens, the other doctor who is named, had nothing  
21                  to do with the order or the treatment of her. The  
22                  only thing he had to do was that on five or seven  
23                  days after she came to the hospital, he gave her a  
24                  psychiatric examination and report for treatment at  
25                  Central Islip Hospital but had nothing to do with

1                   9 these alleged medications. Therefore, for the only  
2                   two doctors whom I represent as the Assistant  
3                   CorporationCounsel, there is no cause of action  
4                   against either of them as a factual matter, as has  
5                   been determined from the depositions. I submit,  
6                   therefore, that it may assist both Mr. Weiss and  
7                   your Honor in determining the merits between the  
8                   State Department of Mental Hygiene and the plaintiff  
9                   -- because the City is not sued and there is no  
10                  pending jurisdiction against the City of New York.  
11                  If the two doctors whom I represent are discontinued  
12                  out of the case then his entire actionwould be  
13                  against the State Department of Mental Hygiene, and  
14                  the City's lien would become possibly academic, and,  
15                  therefore, the whole issues that are raised in that  
16                  thing would drop out of the case.

17                  I would like to hear what Mr. Weiss would say  
18                  in that connection, maybe it would simplify the whole  
19                  issue.

20                  THE COURT: Let Mr. Kantor tell me who he  
21                  represents.

22                  MR. KANTOR: I am from the Attorney General's  
23                  Office. I represent the State Department in this  
24                  action, that is Dr. Miller who is the Commissioner  
25                  of the State Department of Mental Hygiene, and

1 10 Dr. O'Neill who was at thatpoint, the Director of  
2 the Central Islip State Hospital.

3 THE COURT: How about Dr. Blankfeld?

4 MR. KANTOR: I don't believe --

5 MR. ENNIS: They were not properly served.

6 THE COURT: There is an answer here from  
7 Dr. Blankfeld.

8 MR. ENNIS: Is there an answer from him?

9 THE COURT: There is an answer for  
10 Dr. Blankfeld by Sol Bernstein from the Corporation  
11 Counsel's office.

12 Do you know the facts about him?

13 MR. ENNIS: No, I don't, but I could find out  
14 in the next few minutes. I have a copy of the  
15 hospital record.

16 MR. KANTOR: It is our belief that there are  
17 several legal problems notwithstanding the United  
18 States Court of Appeal's opinions.

19 THE COURT: You said you represent Dr. Miller  
20 and Dr. O'Neill?

21 MR. KANTOR: That's correct.

22 THE COURT: You also represent Dr. Dromgoole?

23 MR. KANTOR: No.

24 THE COURT: Who represents her?

25 MR. KANTOR: She's never been served, never

1           11    been made a proper party to this action.

2                         THE COURT: Let's get the facts when the time  
3                         comes for motions we'll know where we are.

4                         Dr. DaCorta was served and nobody appeared for him.

5                         There is a letter dated March 15, 1974 from  
6                         Joel Sachs to Judge Travia saying this is to inform  
7                         the Court that the Attorney General of the State of  
8                         New York hereby appears for Dr. Catherine  
9                         Dromgoole an employee of the defendant Miller in the  
10                        instant matter.

11                        MR. KANTOR: If that is the case then obviously  
12                        we appear for Dr. Dromgoole.

13                        THE COURT: Let me find out about Dr. DaCorta,  
14                        also.

15                        MR. KANTOR: I believe that he's --

16                        THE COURT: He's just described as other  
17                        doctors on the staff of Bellevue Hospital and  
18                        Central Islip State Mental Hospital. He was served  
19                        at 301 East Broadway Fulton, New York on March 5,  
20                        1974 by a U.S. Marshal serving a copy of the summons  
21                        and complaint on his wife and no one has appeared  
22                        for him.

23                        MR. KANTOR: I'll check to see whether he  
24                        is entitled to representation by the Attorney General,  
25                        if so we'll put in an appearance for him.

I would like to address myself to the two  
major defendants, Dr. Miller and Dr. O'Neill. I  
believe that there is a question of law outstanding  
concerning their liability under the official immunity  
doctrine announced by the Supreme Court in Shorter  
v. Rose; and further explained by the Second Circuit,  
a recent case Class against Norton which was decided  
October 10th. I believe on that ground it may very  
well be a dismissal as against Drs. Miller and  
O'Neill in their personal capacity, as they are  
officials and may well be entitled to official  
immunity in their official capacity since they are  
employed by the State of New York. They are immune  
in that regard.

As to the actual doctors administering  
treatment your Honor we are prepared to go forward  
with the defense of those defendants. However, I  
do not want to put Mr. Weiss in a position where  
he's forced to represent a plaintiff which he's not  
ready to represent, and I don't think I could add  
anything more to my comments.

THE COURT: If there is a motion to re-open,  
it should go into the question of what particular  
defendants are properly -- would properly remain in  
the case. I might very well, if there is a trial,

have to dismiss against Dr. Miller and the doctors whom Mr. Weiler mentioned at the beginning.

MR. ENNIS: I do not say the same thing for Dr. Blankfeld. I see that his name appears and it's signed by him on the doctor's order sheet. I would not make the same representation as I did for --

THE COURT: We still have the lien?

MR. ENNIS: He may have to respond.

THE COURT: We have a lot of papers in the file now. We might as well get some more. We'll sort it out and bring it up to date. You still don't want to go ahead this afternoon, Mr. Weiss?

MR. WEISS: Your Honor, I can't. As you may very well understand, to prepare somebody like my client for trial, it takes some time and some discussions with her. It took some time and a great deal of cooperation with these attorneys to have the deposition. It would take some time to walk across Cadman Plaza and come here. I couldn't now call her up and say we are picking a jury.

THE COURT: All right.

MR. WEISS: I'm sorry.

THE COURT: We'll see what comes first.

MR. WEISS: Thank you very much, your Honor.

\* \* \*